No. 15337

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTENNIAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

DAVE SCHNEIDER, doing business as DAVE SCHNEIDER WHOLESALE JEWELRY,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Albert Lee Stephens, Chief Judge, and Homer T. Bone and Richard H. Chambers, Circuit Judges:

Now comes the Appellee in the above-entitled action and pursuant to the provisions of Rule 23 of this Honorable Court, petitions as follows:

I.

That a rehearing be granted.

II.

That the Chief Judge convene the active judges of the court, and that the matter be re-heard *en banc*.

The opinion upon which rehearing is sought is dated August 20, 1957.

Grounds for Petition for Rehearing.

Briefly stated, the grounds for this petition for rehearing are as follows:

I.

In its original opinion,* the Court refused to apply Rule 52(a) of the Federal Rules of Civil Procedure.

II.

In its original opinion, the Court refused to apply controlling principles of local law pertaining to burden of proof.

III.

In its original opinion, the Court did not take cognizance of some of the facts, a consideration of which was essential to a just determination.

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*Attached hereto as "Appendix A."

ARGUMENT.

The writer of this Petition did not prepare the original briefs in connection with this Appeal, and it is believed that the Court fell into an erroneous decision because of the inadequacy of the time allotted for oral argument and the presentation of issues which the Court has treated simply, but which are complex from the standpoint of the insurance lawyer.

It is believed that the Court's opinion renders a grave injustice to Appellee, and moreover is calamitous in its long-range effect. The insurance contract which the Court has interpreted is not a standard form in the sense that such forms are extant in automobile and fire insurance. Cases in which similar language has been construed are rare, and the Court has only to compare the language of the contract under consideration with that contained in the contracts construed in the other cases in order to see that there is no standardization—that the language utilized by the insurers in these so-called jewelry floater policies is such as to afford the carriers the most protection by the most exceptions and the most ambiguity.

We have set out above, briefly and distinctly as required by Rule 23, the grounds of this Petition, and will discuss such grounds in inverse order:

I.

In Its Original Opinion, the Court Did Not Take Cognizance of Some of the Facts, a Consideration of Which Was Essential to a Just Determination.

We urge the Court to reconsider its decision that clause 5(I) of the insurance contract is "clear and unambiguous" as against Appellee's contention that such clause, with all intendments indulged in favor of him, the assured, does not apply to theft. It is in connection with this importunity that we submit that the Court did not, in its original opinion, consider all of the material facts. On page 3 of its opinion, the Court quotes the pertinent exception, and treats of the claimed ambiguity as if the contention rested upon the language of the exception alone.

The Court neglects to apply the undisputed rule that interpretations of contracts are to be made from a consideration of the contracts as a whole. For the convenience of the Court, we are attaching to this Petition, as "Appendix B," the insuring provisions of the contract, calling attention to these specific facts which the Court overlooked in writing its opinion:

1. The word "theft" is not used in exception 5(I).

2. When the draftsmen who prepared the insurance contract for Appellant intended to write exceptions pertaining to theft, their language was explicit. We direct the Court's attention to exception 5(A), wherein the word "theft" is used, and also to exception 5(K), wherein the words "theft or attempted theft," are used.

The Court has characterized our original argument as "clever," and from the reading of the Court's opinion, indicating that our argument is based upon the language of the exception alone, the characterization might be apt.

But when we see from a close reading of the entire policy of insurance, that when theft was sought to be excluded in exceptions 5(A) and 5(K), language was used which was clear and unmistakable, and then when we, in turn, compare the obscure language of exception 5(I), we must, in good conscience, reject the compliment paid to us by the Court. Our argument is not "clever," and neither is it ingenuous. We submit that the Court, in the interpretation of exception 5(I), failed to take into account the language of the contract as a whole. There was no mention in the opinion of Section 1641 of the California Civil Code, providing "The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, *each clause helping to interpret the other.*" (Italics ours.) We submit that we are not being entirely blind when, in view of these omitted considerations from the Court's opinion, we have difficulty in reconciling the Court's interpretation with the established and salutary principle of California law, that:

> "If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage whether as to peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured."
>
> *Continental Casualty Co. v. Phoenix Const. Co.* (1956), 46 Cal. 2d 423, 437-438;
>
> *Ensign v. Pacific Mutual Life Insurance Co.* (Feb., 1957), 47 A. C. A. 887, 891.

II.

In Its Original Opinion, the Court Refused to Apply Controlling Principles of Local Law Pertaining to Burden of Proof.

We are mindful of the careful and commendable thoroughness with which the Court has conducted its investigation into the facts developed by the oral testimony. It is believed, however, that the Court, in ignoring the principle point debated by the litigants at length in their briefs, that is, the question of burden of proof, has constituted of itself an independent fact-finding body. The inferences which this Court draws from the facts are, from Appellee's standpoint, subject to debate,* although we concede that, in the main, the Court's reasoning is logical. But in ignoring the crucial issue, the opinion of this Court, in effect, stamps the learned District Judge as one who is stupid, if not utterly foolish. We submit that this Court's opinion does an injustice to the trial judge and makes him appear idiotic because it does not cast him in a proper light.

This Court concludes that the evidence more clearly points to the fact that Appellee's property was stolen while he was away from his automobile, and, therefore, following analysis of the facts without mention of the lengthy argument devoted in the litigants' briefs to the principle of burden of proof, overturns the finding of fact made by its inferior judge.

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*For example, the Court in re-evaluating the evidence states on page 7 of its opinion, "If the traffic was bumper to bumper, (as Appellee testified), so that Appellee could not move speedily, it seems clear that a speedy get-away of the thieves would be impossible." Could this Court not take judicial notice of the fact that cross streets intersect main thoroughfares in the metropolitan Los Angeles area?

The trial court felt itself bound by a principle of local law to which this Court's opinion does not allude. If the trial court had been free to decide the facts independently of any consideration of burden of proof, it very probably would have arrived at the factual conclusion reached by this Court. But the trial judge, as he was obliged to do, applied the well-settled local and almost universal rule that the insurer has the burden of proving the facts which it claims bring into application an exclusion or exception within the terms of an insurance contract.

Referring to "Appendix B," attached hereto, and particularly to Paragraph 5, the coverage afforded is seen to be, "F. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever *except:*" (Italics ours.) Then follows, in fine print, thirteen exceptions, eight sub-exceptions, and fifteen conditions. Among the thirteen exceptions are exceptions 5(A) and 5(K), wherein loss by theft is expressly excluded, and exception 5(I), wherein the term theft is not employed, but which the Court reads into the exception in order to deprive Appellee of benefits for which he had paid an exorbitantly high premium.

In the coverage clause above quoted, we have italicized the word "except." In the body of exception 5(I) which follows the provision as a whole is referred to as "this exclusion."

When, at the time of oral argument, we sought to devote some attention to Rule 52(a), Federal Rules of Civil Procedure, one of your Honors silenced us with the comment that the interpretation of the rule was "Hornbook Law." It is also "Hornbook Law" that, even if we concede that exception 5(I) was applicable to a theft, the burden rested upon the insurer to prove that Appellee's

property was stolen while he was away from the automobile.

Throughout these proceedings, all parties have agreed that the property was stolen at some time during the trip in question. The Appellee could not prove that the property was stolen while he was in the car. The Appellant could not prove that it was stolen while Appellee was away from the car. Therefore, the trial court concluded, as it was bound to do, that since the burden of proof rested upon Appellant, and could not be met, its finding had to be against a fact, the proof of which rested upon Appellant. The holding of the Supreme Court of California in *Bebbington v. California Western States Life Ins. Co.* (1947), 30 Cal. 2d 157, 159, 162, 180 P. 2d 183, demanded judgment for Appellee.

Even if this Court should determine, finally, that our client must suffer his loss without redress, we still urge that the Court, in fairness to the trial judge, grant this petition for rehearing, meet the issue forthrightly, and explain in a supplemental opinion the basis upon which the trial court's judgment was obviously reached. If this Court is to refuse to apply the local law pertaining to an insurance company's burden of proof when an exception is invoked, the opinion should say so. If the Court intended, which it does not say, to reach its factual conclusion with the principle in mind, then potential disputants of the future are entitled to the expression in the opinion of such a guide.

In this connection, the case of *Rossini v. St. Paul Fire & Marine Insurance Co.,* 182 Cal. 415, is interesting and pertinent in making clear that when a fire insurance company sought to invoke an exclusion pertaining to explosion, its contention would have to fail when it was unable to

prove whether the explosion or fire occurred first in point of time.

We realize the heavy burden of work which must rest upon your Honors, but in view of the importance of this decision to the premium-paying public, Appellee sincerely prays that his Petition for Rehearing be granted, and that he have the opportunity to present his position orally before the Court sitting *en banc*.

Respectfully submitted,

BETTS, ELY & LOOMIS, and
SAMUELSON & BUCK,
By WALTER ELY,
Attorneys for Appellee.

State of California, County of Los Angeles—ss:

Walter Ely, the attorney upon whom the chief responsibility has rested for the representation of Appellee, hereby certifies that, in his judgment, this Petition for Rehearing, prepared by him, is well founded and that it is not interposed for delay.

Dated this 17th day of September, 1957.

WALTER ELY.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

Centennial Insurance Company, a Corporation, Appellant, vs. Dave Schneider, Doing Business as Dave Schneider Wholesale Jewelry, Appellee. No. 15,337, Aug. 20, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, Chief Judge, BONE and CHAMBERS, Circuit Judges.

BONE, Circuit Judge.

Centennial Insurance Co. (hereinafter "Centennial"), defendant below, appeals from a judgment entered by the District Court. The action was brought by Dave Schneider, doing business as Dave Schneider Wholesale Jewelry, to recover on a policy of insurance issued by Centennial to appellee on August 15, 1954, and continuing in force for a period of one year. The claimed loss of jewelry and their carrying cases allegedly covered by the policy occurred on December 3, 1954.

On the morning of December 3, 1954, at about 10:00 A.M. appellee left his place of business. As a wholesale jeweler appellee traveled by car from retailer to retailer, carrying the jewelry to be displayed in two specially fitted cases which he carried in the trunk of his car. Following his lunch, he drove to Bruce Jewelers in Inglewood, California, removed the cases from the trunk of his car, took them into the jewelry store, displayed his line of jewelry, returned the cases to the trunk, and drove to Joy Jewelry Company, also in Inglewood.

Appellee did not remove his cases at Joy Jewelry Co. He did not enter the premises, but talked with one of the buyers at Joy, Mr. Stelzer, in front of the store so he could see his car. Appellee and Stelzer got into appellee's car, drove around the block and into a blind alley and parked appellee's car behind a new car (a Ford and hereinafter called "Ford") purchased by Stelzer for his wife. Both appellee and buyer apparently got into the Ford car, the buyer then showing appellee the dashboard equipment. Appellee testified he had locked his car, and adjusted the rear view mirror of the Ford so that he could see his car. The inspection of the Ford lasted from five to fifteen minutes. Appellee then returned to his car and drove about four miles to the store of another customer, California Premium Service.

The drive to California Premium Service took some forty-five minutes because of heavy traffic at that hour. Appellee parked his car close to California Premium Service and claims that he watched it at all times while talking to Mr. Nigro of California Premium Service, except for about one minute when he examined a diamond, and during this time Mr. Nigro watched appellee's car. It was after inspecting the diamond that appellee opened the car trunk to remove his cases, and found both cases were not there. Centennial was notified and the police called.

Appellee's car was a 1954 Cadillac Coup de Ville model. The trunk latch locked automatically when the trunk door or lid was closed. The trunk latch showed no evidence of tampering. The trunk lid was of the type which rises if not latched shut because of a spring mechanism. Testimony was conflicting as to how high the trunk lid would have to rise or would have to be raised up for appellee to notice it by looking into the rear view mirror. At trial

appellee testified it would have to be up all the way for him to see it in his rear view mirror. The jewelry cases were about 4½ feet tall, 2½ feet wide and 20 inches in depth, weighed about 25 pounds when empty, and about 65 pounds (counting the jewelry contents) on the day in question. Each case was on wheels to facilitate moving it. Counsel for Centennial elicited by questioning at trial (and strongly emphasizes in its brief in this Court) that between the time he left his place of business at 10:00 A.M. and the time he discovered the loss of the jewelry, about 4:30-5:00 P.M., appellee made no use of a rest room, the implication being that appellee probably did make use of a rest room during this seven hour period, forgot about it, and that it was during this time when the car would be out of his sight that the theft was committed.

Both parties seem to entertain the view that the loss was a result of a *theft,* and the District Judge found the jewelry to have been *stolen.* Major controversy centers on clause 5(I) of the policy, which reads:

"5. This policy insures against all risks of *loss of or damage to* the above described property arising from any cause whatsoever *except:*

* * * * * * * * *

"(I) *Loss or damage to property insured hereunder while in or upon any automobile,* motorcycle or any other vehicle *unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle.* This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail." (Emphasis supplied.)

Appellee argues that the language in the exception clause, (I), "* * * loss or damage *to* property while in or upon an automobile * * *," is ambiguous, and should be construed most strongly against Centennial. Appellee also asserts that "* * * loss or damage *to* property * * *" can mean only *damage to* property and does not include *theft* as a theft involves "loss *of*" property rather than "loss * * * *to*" property. Thus, says appellee, the exception clause does not apply in this case. This is a clever argument, and is indicative of the thoroughness with which counsel has represented appellee. However, we cannot accept the argument. We believe the language of the policy excepting "*loss or damage to* property" expresses the intention to except *theft of* property from an automobile on the terms therein stated, and not alone to except *damage* to property (assuming damage means something entirely different from theft). We are supported in this view by other decisions which have found similar language to be reasonably clear and unambiguous, and applied such language to cases of theft. *Cf.* Greenberg v. Rhode Island Ins. Co., 1946, 66 N. Y. S. 2d 457, 459; Princess Ring Co., Inc. v. Home Ins. Co., 1932, 52 R. I. 481, 161 Atl. 292, 293.

It is appellee's further contention that direct testimonial evidence shows that the insured property was not taken from the car while appellee was out of the car since at all such times the car was watched and no one watching saw anyone open the trunk. From this appellee argues that he not only must have been, but that he was, in the car at the time of the theft. This apparently was the view of the trial judge as findings were made that the "* * * jewelry and sample cases and trays were stolen from the trunk of plaintiff's automobile at a time when the plaintiff was in such vehicle."

While testifying, appellee, over objection of Centennial's counsel, gave as his opinion to explain the occurrence of the loss, that it probably happened during the time that appellee was driving to California Premium Service after leaving Stelzer following examination of Stelzer's Ford. The traffic moved slowly, there were many stops. Appellee was of the opinion the thief (or thieves) somehow removed the cases and contents while his car was stopped, loaded them into another vehicle and made a getaway.

Centennial asserts that such a view of the "theft" must be rejected as "inherently incredible"; that the theft could not have happened while appellee was in the car without appellee being aware of its commission.

Under Rule 52(a) of the Fed. Rules Civ. Proc., a finding is clearly erroneous when, although there is evidence to support it, a reviewing court on reviewing the entire evidence is left with a definite and firm conviction that a mistake has been made. United States v. Gypsum Co., 1948, 333 U. S. 364, 395-396; Smyth, Collector of Internal Revenue v. Erickson, 1955, 9 Cir., 221 F. 2d 1, 4; Alaska Freight Lines v. Harry, 1955, 9 Cir., 220 F. 2d 272, 275. Cf. United States of America v. One 1950 Buick Sedan, 1956, 3 Cir., 231 F. 2d 219, 223, on drawing reasonable inferences from "basic facts."

After a complete study of the evidence we are left with the conviction that a mistake has been made. We reach this conclusion for two reasons. In the first instance, the testimonial evidence is not convincing that appellee or others with whom he did business that day could adequately *see* the trunk of the car at all times. Of particular interest is the testimony concerning the several minutes that appellee was inside the Ford examining it with Stelzer

of Joy Jewelry Co. If we take the testimony most favorable to appellee (as we are required to do) United States of America v. Comstock Extension Mining Co., Inc., et al., 1954, 9 Cir., 214 F. 2d 400, 403, we find these facts: the Stelzer Ford was parked in a blind alley; the front of appellee's Cadillac was parked closely behind the rear of the Ford; the rear end of the Cadillac was about parallel with the sidewalk running along a street which ran at right angles to the alley; appellee was in the front seat of the new Ford car attempting to watch the trunk of his car by looking into the rear view mirror while he also looked at the instrument panel of the Ford and talked with Stelzer; appellee testified that he couldn't see the back of his car "* * * very well, because the back was quite a ways back * * *;" appellee looked into the rear view mirror "* * * off and on * * *" as Stelzer showed him the panel in the Ford; appellee spent (by the most favorable testimony) five to seven minutes in the Ford.

We believe this testimony substantially derogates from appellee's insistence that he could see his car at all times. These facts are specially significant when considered with that part of appellee's theory which postulates that the thief (or thieves) in some way had procured a key which fitted the lock and could open the trunk with ease and dispatch. With a key to expedite opening, and with appellee having a poor view of the trunk, the trunk could have been opened, raised to a height sufficient to remove the cases, the theft completed and the getaway made without appellee being conscious of the crime. We believe that Centennial has shown by appellee's testimony that he did not always have a clear view of his car when not in it, so that the theft could have been committed while appellee

was not in the car and without appellee knowing of or seeing its commission.

We also believe that it is most doubtful that the two cases with their contents could have been removed from the trunk while appellee was in the car without appellee being aware at the time that a theft was taking place, though he might not have been able to prevent its completion. We must remember that each case measured 4½ feet tall, 2½ feet wide and 20 inches deep, and weighed (with contents) sixty-five pounds each. Each case was in the trunk of an automobile so that the trunk lid would have to be raised to remove it. Evidence is not clear as to how high the trunk lid would have to be raised, but it would have to be raised at least 20 inches, as this is the minimum measurement of the cases. Probably the trunk would be opened wider so the thief (or thieves) could more easily take hold of the cases and remove them without dragging them across the car frame and edge of the trunk, which would shake the vehicle, make considerable noise, and alert the driver. And when a sixty-five pound weight is removed from the rear of a car, the car probably would move or sway sufficiently to arouse the driver to the fact that something is happening to his car; he will look about. And further, the thief (or thieves) must have shut the trunk with sufficient force to lock it shut as appellee testified that if not latched properly the trunk lid would rise, especially if he drove. Appellee testified that it did not rise while he drove that day, and that it was locked when he went to remove the cases at California Premium Service. Yet, through all of these possible steps which the thief (or thieves) would have taken to complete the theft, appellee was unaware of any noise in, or unusual or surprising motions of the car.

But even if the appellee might not notice such events, drivers moving behind appellee would certainly have seen the thief (or thieves) and probably those drivers, when seeing a person (or persons) surreptitiously approach appellee's car and without any sign of approval by appellee remove two large cases and place them in another car or take them to the sidewalk, would sound their horns or call. But even if there was complete silence from all the other users of the road at that time, and even if the trunk could not be seen in the rear view mirror unless raised to its maximum height, the thief (or thieves) would have had to carry or wheel the cases to the sidewalk or to another vehicle, which would have given appellee an excellent opportunity to see at least part of the commission of the crime. A person (or persons) walking about in a busy street, even if traffic is temporarily halted, carrying or wheeling large cases would attract attention.

But the basic theory of appellee is that the theft was committed by removing the cases from his car and placing them in a getaway car while appellee was held up by slow moving traffic. This directly conflicts with appellee's theory that the crime was accomplished this way so that a fast escape could be made. If traffic was "bumper to bumper," (as appellee testified) so that appellee could not move speedily, it seems clear that a speedy getaway of the thieves would be impossible.

Centennial has shown by the testimony of appellee himself that he could not see his car clearly at all times when he was out of it. This overcomes appellee's assertion that the theft was committed while appellee was in the car as he could observe the car at all times and no one removed anything from the trunk while he watched it. And we believe that appellee's own theory of the theft is incredible.

After reviewing the entire record we entertain the firm and definite conviction that a mistake was made by the trial court. On the basis of all the evidence in this case, we believe that in finding that the jewelry was stolen from the car trunk at a time when appellee was in such vehicle, the lower court bridged an impassable chasm with an assumption.

The cause is remanded to the District Court with instructions to vacate the judgment and to enter judgment that appellee take nothing.

(Endorsed:) Opinion. Filed Aug. 20, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "B."

Jewelers' Block Floater

Attached to and forming part of Policy Number 2WF 4871 issued to Dave Schneider dba Dave Schneider Wholesale Jewelry. Amount $40,000.00. Premium $597.21.

1. In consideration of the premium above specified, and of the Proposal(s) and Declaration (s) dated the 15th day of August, 1954, attached hereto and made a part hereof and which is (are) hereby agreed to be the basis of this policy, and which the Assured hereby warrants to be true as to each and every statement and particular contained therein,

This Company Does Insure:

Dave Schneider dba Dave Schneider Wholesale Jewelry, herein called the Assured, whose address is 205 East Broadway, Long Beach, California and whose premises are located at same from the 15th day of August 1954 to the 15th day of August 1955 both days at noon, standard time at place of issuance.

Limitations of Liability

2. The maximum liability of the Company resulting from any one loss, disaster or casualty is limited to

(A) $40,000.00 in respect of property at the Assured's premises as described herein;

(B) $20,000.00 in respect of property which is (1) in transit by first class registered mail, or railway express (subject to the stipulations of Exclusion (E) of Section 5), or by armored car service; (2) deposited in the safe or vault of a bank or safe deposit company; (3)

in the custody of a dealer in property of the kind insured hereunder not employed by or associated with the Assured, but property deposited for safe keeping with such a dealer by the Assured or its authorized representatives while traveling is subject to the limit expressed in Clause E of this Section;

(C) $2,000.00 in respect of shipments by first class registered air mail or air express (subject to the stipulations of Exclusion (E) of Section 5) sent to any one addressee at any one address during any one day;

(D) $500.00 in respect of shipments in transit by customer parcel delivery service and the parcel transportation service of railroads, waterborne or air carriers and passenger bus lines (subject to the stipulations of Exclusion (E) of Section 5);

(E) $15,000.00 in respect of property elsewhere and not included in Clauses (A), (B), (C) and (D) above or otherwise limited herein.

Property Insured

3. The Property Insured is as Follows:

(a) Pearls, precious and semi-precious stones, jewels, jewelry, watches and watch movements, gold, silver, platinum, other precious metals, and alloys and other stock usual to the conduct of the Assured's business, owned by the Assured.

(b) Property as above described, delivered or entrusted to the Assured by others who are not dealers in such property or otherwise engaged in the jewelry trade;

(c) Property, as above described, delivered or entrusted to the Assured by others who are dealers in such property or otherwise engaged in the jewelry trade, but

only to the extent of the Assured's own actual interest therein because of money actually advanced thereon, or legal liability for loss of or damage thereto.

Territorial Limits

4. The property described above is covered anywhere in, and in transit within and between, the Continental United States of America, Alaska, Canada, the Hawaiian Islands and Puerto Rico, but subject always to the limitations, conditions, exclusions and exceptions stated herein.

Insuring Conditions

5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:

(A) Loss, damage or expense caused by or resulting from sabotage, theft, conversion or other act or omission of a dishonest character (1) on the part of the Assured or his or their employees, or (2) on the part of any person to whom the property hereby insured may be delivered or entrusted by whomsoever for any purpose whatsoever, unless such loss arises while the goods are deposited for safe custody by the Assured, officer of the corporation, member of the firm or salesman while traveling, or while the goods are in the custody of (a) the Post Office Department as first class registered mail, or (b) a carrier mentioned in Section 2, or (c) a person serving as a mere porter or helper not on the payroll of the Assured.

(B) Loss or damage caused by delay, loss of marker, gradual deterioration, moth, vermin, inherent vice or insufficient or defective packing, or damage sustained while the property is being actually worked upon and directly resulting therefrom.

(C) Loss or damage caused by or resulting from

(1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (a) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (b) by military, naval or air forces; or (c) by an agent of any such government, power, authority or forces;

(2) any weapon of war employing atomic fission or radioactive force whether in time of peace or war;

(3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.

(D) Loss or damage occurring at the Assured's premises as stated herein caused by or resulting from earthquake or flood (meaning rising navigable waters). However, if the peril of fire is not excluded hereunder this policy will cover fire damage occurring during or resulting from such earthquake or flood.

(E) Loss or damage occurring in course of transit to shipments by

(1) mail unless registered first class;

(2) express unless by railway express (including air division thereof) provided, however, that a package of a value of $1,000 or more sent by the Assured, its officers, agents, servants or employees, is not covered unless it is sealed with wax or lead and unless a special declaration of value is made to the carrier amounting to not less

than 10% of the actual value of the contents of the package. In no case need such declared value exceed $1,000;

(3) railroad, waterborne or air carriers unless under receipt of their passenger parcel transportation or baggage services;

(4) motor carriers or truckmen other than under receipt of:

(a) those operating exclusively as a customer parcel delivery service;

(b) armored car service;

(c) the parcel transportation or baggage services of passenger bus lines.

(F) Breakage of articles of a fragile or brittle nature, unless caused by fire, lightning, explosion, aircraft, vehicles, flood, earthquake, windstorm, strikers, rioters, persons taking part in labor disturbances or civil commotions, burglars, thieves or accident to the conveyance in which the property insured is being carried (but only when and to the same extent that such perils are otherwise covered under this policy).

(G) Loss or damage to goods sold on the installment plan from the time they leave the Assured's custody.

(H) Loss or damage while the property is being worn (except watches worn solely for the purpose of adjustment) by the Assured, officer of the corporation, member of the firm, director, agent, employee, servant or messenger of the Assured, or by any dealer or other person, firm or corporation engaged in the jewelry trade or by any of their officers, directors, agents, employees, servants or messengers or by any member of the family, relative or friend of any of the aforesaid, or while in their custody for such purpose.

(I) Loss or damage to property insured hereunder while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. This exclusion shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail.

(J) Loss or damage to the property hereby insured while at any exhibition promoted or financially assisted by any Public Authority or by any Trade Association.

(K) Loss of or damage to property contained in show windows at the Assured's premises by theft or attempted theft accomplished by or resulting from the smashing or cutting of such windows except as may be endorsed hereon.

(L) Loss of or damage to property exhibited by the Assured in show cases or show windows elsewhere than at the premises of the Assured as referred to in this policy except as may be endorsed hereon.

(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken, nor for loss of or damage to goods when sent "C.O.D." with the privilege of inspection by the consignee before delivery.

6. To the extent of 10% of the limit of liability stated in Section 2 as applicable at such premises this Company will pay for damage (except by fire) to that part of the building occupied by the Assured directly resulting from

theft or any attempt thereof provided the Assured is the owner of such premises or is legally liable for such damage, but in no event shall this section apply to glass or to any lettering or ornamentation thereon. The Company's combined liability under this section and under Item (A) of Section 2 shall not exceed the amount of insurance shown under Item (A) of Section 2 for the premises at which such loss or damage occurs.

7. No assignment of or change of interest under this policy shall bind the Company, nor shall any change in or additions to the premises of the Assured stated in this policy be covered hereunder, unless the consent of the Company shall be endorsed hereon. No agreement, condition, or declaration of this policy shall be waived or changed, except by endorsement countersigned by a duly authorized agent of the Company. No notice to, or knowledge possessed by any agent or any other person shall be held to effect a waiver or change in any part of this policy unless endorsed hereon and signed as above provided.

8. It is a condition of this insurance that

(A)The Assured will maintain a detailed and itemized inventory of his or their property and separate listing of all travelers' stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company.

(B) The Assured will maintain during the life of this policy, insofar as is within his or their control, watchmen and the protective devices as described in his or their proposal form or in endorsements attached hereto.

9. (A) The Company shall not be liable beyond the actual cash value of the property at the time of any loss or damage and the loss or damage shall be ascertained or

estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed the lowest figure put upon such property in the Assured's inventories, stock books, stock papers or lists existing at the time the loss occurred, nor the cost to repair or replace the same with material of like kind and quality. Any antiquarian or historical value attaching to the said property shall be excluded from the estimate of loss or damage.

(B) Claims in respect of loss of or damage to pledged articles shall be limited to the amount actually loaned and unpaid plus the interest thereon at legal rates accrued at date of loss.

10. In case of loss of or damage to property of others held by the Assured, for which claim is made upon the Company, the right to adjust such loss or damage with the owner or owners of the property is reserved to the Company and the receipt of such owner or owners in satisfaction thereof shall be in full satisfaction of any claim of the Assured for which such payment has been made. If legal proceedings be taken to enforce a claim against the Assured as respects any such loss or damage, the Company reserves the right at its option without expense to the Assured, to conduct and control the defense on behalf of and in the name of the Assured. No action of the Company in such regard shall increase the liability of the Company under this policy, nor increase the limits of liability specified in Section 2 hereof.

11. It is understood and agreed that any insurance granted herein shall not cover (excepting as to the legal liability of the Assured), when there is any other insurance which would attach if this policy had not been issued, whether such insurance be in the name of the Assured or of any other third party. It is, however, understood and

agreed, that if under the terms of such other insurance (in the absence of this policy) the liability would be for a less amount than would have been recoverable under this policy (in the absence of such other policy) then this policy attaches on the difference.

12. This insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

13. In the event of loss or damage, or of anything likely to result in a claim under this policy, the Assured shall give immediate notice in writing to the Company, protect the property from loss or damage, furnish a complete list of the lost or damaged property stating the market value and cost of each article and the amount claimed thereon; and the Assured shall within sixty (60) days after a loss (unless such time is extended in writing by the Company), render to the Company a proof of loss signed and sworn to by the Assured, stating the knowledge and belief of the Assured as to the following. The time and cause of the loss or damage, the interest of the Assured and of all others in the property affected, the cash value of each item thereof, and the amount of loss of or damage thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of such property and shall furnish a copy of all the descriptions and schedules in all such insurance policies if required.

14. The Assured as often as may be reasonably required shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of their households and employees to submit to examinations under oath by any persons named by the Company relative to any and all matters in connection with a claim and subscribe the same, and shall produce for examination all books of account, bills, in-

voices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made. No such examination under oath or examination of books or documents, nor any other act of the Company or any of its employees or representatives in connection with the investigation of any loss or claim herein under, shall be deemed a waiver of any defense which the Company might otherwise have with respect to any such loss or claim, but all such examinations and acts shall be deemed to have been made or done without prejudice to the Company's liability.

15. There shall be no abandonment to the Company of any property but the amount of loss or damage for which the Company may be liable shall be payable sixty (60) days after satisfactory Proof of Loss as herein provided, is received by the Company.

16. It is understood and agreed that if in case of loss the Assured shall acquire any right of action against any individual, firm or corporation for loss of or damage to the property insured hereunder, the Assured will, if requested by the Company, assign and transfer such claim to the Company or, at the Company's option, execute and deliver to the Company the customary form of loan receipt, upon receiving payment for loss or advancement of funds in respect of the loss and will subrogate the Company to or will hold in trust for the Company, all rights and demands of every kind, respecting the same, to the extent of the amount paid or advanced, and will permit suit to be brought in the Assured's name at the expense of the Company.

17. In case of any loss or damage of any kind whatsoever, it shall be lawful and necessary, for the Assured or

his, or their factors, servants or assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance or any part thereof without prejudice to this insurance or waiver of the Assured's rights hereunder.

18. No suit, action or proceeding for the recovery of any claim under this policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the State within which this policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such State to be fixed herein.

19. It is agreed that the sum hereby insured shall be reduced by the amount of any loss covered by this policy, and that the maximum limits of liability applicable to the loss, shall likewise be reduced by the amount of all losses. Such reductions shall take effect as of the date of the occurrence from which the loss arises. The amount of loss, for the purpose of this clause, shall include any amount due to the Assured and any sums paid as rewards for the recovery of insured property, or otherwise. However, the full amount insured shall be reinstated automatically and a pro rata additional premium shall be payable from the date of the occurrence. Pending adjustment of any loss, payment of the premium for reinstatement of the amount thereof may be deferred until the amount of the loss has been fixed and the precise amount of the reinstatement premium is known.

20. This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject hereof or

in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

21. This policy may be canceled by the Assured by mailing to the Company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Company by mailing to the Assured at the address shown in this policy or last known address written notice stating when not less than five (5) days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Assured or by the Company shall be equivalent to mailing. If the Assured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Assured.

22. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

(Signed) Jack Grand Agent.
Jack Grand
Insurance
Heartwell Bldg.
Long Beach 2, Calif.